QUESTION PRESENTED

Do the federal courts have jurisdiction to enforce the notice, bargaining and status quo obligations of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, when a carrier unilaterally changes existing working conditions, asserting that it has a contractual right to make such unilateral changes, but fails to establish that it has a clear and patent contractual right to make those changes?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

On October 3, 1988, this Court granted the petition of Consolidated Rail Corporation [hereinafter, "Conrail"] and issued a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment and opinion of that court in *Railway Labor Executives' Assoc. v. Conrail*, 845 F.2d 1187. This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and eighteen of its member organizations [2] in support of the Third Circuit's decision and judgment.

[1] RLEA is an unincorporated association of the chief executive officers of nineteen (19) labor organizations which collectively represent most organized rail employees in this Country. A list of RLEA's member organizations is attached to this brief as Appendix A.

[2] The United Transportation Union's Yardmasters' Department is a member organization of RLEA, but was inadvertently not included in the caption of the Complaint as a plaintiff; that organization, however, was listed as a plaintiff in the body of the complaint.

COUNTERSTATEMENT OF THE CASE

While drug abuse has received national attention during the past few years, it is not a new problem, either for the country as a whole or for the rail industry in particular. Indeed, drug abuse has posed a serious safety threat to the rail industry, and to the public affected by their operations, virtually since the inception of this industry. In the early nineteenth century, before railroad employees were organized, their employers attempted to control drug abuse by promulgating a rule for the conduct of employees, commonly called Rule G,[3] which forbids employees from using, possessing, or being under the influence of alcohol while on duty or while subject to call.[4] Department of Transportation, Federal Railroad Administration, *Random Drug Testing; Amendments To Alcohol/Drug Regulations*, 53 Fed. Reg. 47,102 at 47,103 (Nov. 21, 1988). Those rules have since been expanded to ban the use of controlled substances while on duty or subject to call. Rail management has not been alone in its efforts to eliminate the safety hazards arising from drug usage, for as the Federal Railroad Administration [hereinafter, "FRA"] noted recently while discussing the "development of employee assistance programs and encouragement of education and awareness activities" concerning drug usage

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[3] Conrail's Rule G now provides as follows (J.A. at 63):

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

[4] Virtually all railroads have promulgated rules outlining conduct which they require of their employees. These rules have various names, such as "Operating Rules" or "Rules For The Conduct And Guidance Of Employees," and, as a general matter, the rules themselves have not been the subject of collective bargaining. However, rail labor has bargained about the manner in which those rules are enforced. *See*, Joint Appendix [hereinafter, "J.A."] at 40-41, 45, 63-65, 109-10. Rule G is such a rule.

(53 Fed. Reg. at 47,102): "Rail unions have included sobriety and mutual assistance in their organizational objectives since their formation in the last century." This organizational objective has continued up to and including the present, for rail labor, together with rail management, and along with the cooperation of the FRA, have developed programs, which are currently in place on several large railroads, that educate employees to the dangers inherent in alcohol and controlled substance abuse, encourage employees to identify co-workers who are impaired by drug usage or who have a drug problem, and provide appropriate assistance to rehabilitate those identified employees. *Id.*, 53 Fed. Reg. at 47,102-103. *See also*, Joint Appendix in No. 87-1555, *Burnley v. RLEA*, at 111-12. Moreover, rail labor has entered into agreements with carriers that deal with the manner in which tests will be conducted and the consequences of testing positive for the presence of controlled substances. *See*, 53 Fed. Reg. at 47,108, 47,110, and 47,115.

This case, however, does not present such a program or agreement. Rather, it involves petitioner Conrail's unilateral efforts to control drug usage without providing the employee-safeguards, such as procedures to insure the accuracy of the test results, confidentiality assurances, and rehabilitation incentives, that rail labor has long maintained are essential to an effective and fair program.

A. *Conrail's Drug Testing Policies*

Conrail is a creature of statute, and it was required by Section 504(a) of the statute which created it, the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 774(a) (repealed), with certain exceptions not relevant here, to "assume and apply . . . all obligations under existing collective-bargaining agreements covering all crafts and classes employed" on the railroads whose properties formed Conrail's rail system. Conrail, in compliance with that statute, thus assumed and applied on

April 1, 1976, Rule G and comparable rules, as well as those collective bargaining obligations associated with the enforcement of those rules. J.A. at 45. As pertinent to this case, Rule G and comparable rules on Conrail, as was the case on Conrail's predecessors, do not prohibit the use of alcohol or controlled substances while an employee is off duty and not subject to call for service. J.A. at 63. Moreover, until recently, Conrail and its predecessors relied solely upon supervisory sensory observations and voluntary rehabilitation to enforce its drug and alcohol restrictions. J.A. at 63-64.

Besides restricting drug usage while on duty or subject to call, Conrail and its predecessors have established certain physical standards which an employee must meet to perform safely the work which may be assigned to that employee. In order to assure that employees meet those medical standards, Conrail requires all applicants to undergo a pre-employment physical. J.A. at 72. Conrail also requires periodic and return-to-duty physicals for current employees. This case involves solely the physicals for current employees and whether Conrail can change its policies concerning drug screening without first bargaining with rail labor. As Conrail informed the district court: "Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions" not relevant here. J.A. at 68. All train and engine service employees who have been out of service for more than thirty (30) days are required to undergo a physical before they can return to duty, and all other classes of employees who have been out of service for more than ninety (90) days are required to undergo a return-to-work physical. J.A. at 69. Finally, Conrail requires employees who have certain medical problems, such as epilepsy, hypertension or a prior heart attack, to undergo periodic special medical examinations. J.A. at 69-70.

When an employee or prospective employee undergoes a medical examination, Conrail "routinely includes" a urinalysis for blood, sugar, and albumin. J.A. at 69, 72. Rail labor has not objected to that practice. In 1978, however, Conrail began to test the urine obtained from some employees during those periodic medical examinations for the presence of controlled substances and alcohol. J.A. at 39-40. But not all urine samples were tested for the presence of those substances;[5] rather (J.A. at 65):

> With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

According to Conrail, "employees whose urine was tested for the presence of drugs/alcohol were always told before they provided a urine specimen that such testing would be conducted." J.A. at 39.

In October 1985, Conrail posted a notice on its bulletin boards announcing that it was revising its testing rules to conform to the post-accident testing regulations promulgated by the FRA at 49 C.F.R. § 219, *et seq.*, and, in February 1986, Conrail sent a pamphlet to all employees "which also announced the rules promulgated by the" FRA in 1985. J.A. at 41. Those new procedures were implemented in March 1986, when Conrail instituted a policy of requiring all employees covered by the Hours

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[5] In 1984, Conrail modified this practice to require a drug screen as part of all urine analyses, but that practice was implemented in only one of the four Conrail regions and was discontinued for budgetary reasons six months thereafter. J.A. at 68.

of Service Act, 45 U.S.C. § 61, *et seq.*,[6] to undergo post-accident or rules violation urine toxicological testing. According to Conrail, this form of testing was required by the FRA's regulations, promulgated on July 29, 1985, which instructed most railroads, including Conrail, to perform toxicological urine tests of employees covered by the Hours of Service Act who were involved either in train accidents or in specified operating rule violations. 49 C.F.R. Part 219, § 219.202, *et seq.*[7] J.A. at 64. However, after a Conrail train was involved in a serious collision in January 1987 in which people were killed and injured, and where the engineer and conductor of the Conrail train later admitted smoking marijuana in the engine cab just prior to the collision, Conrail announced on February 20, 1987, that all employees who underwent a periodic, return-to-duty or follow-up physical would be required to provide at those physicals urine samples which would be subjected to toxicological analyses for the presence of controlled substances. J.A. at 68.

Although Conrail claims that this new testing policy is justified by its medical examination policy, the impact on employees is different than is the case when a physical uncovers a medical problem. Conrail employees who undergo a periodic or return-to-work physical and fail to meet Conrail's medical standards are held out of service until the medical condition is corrected. J.A. at 70. Significantly, those employees do not lose their seniority because of their medical problems. *Id.* However, employees who test positive for the presence of controlled

[6] Employees who are subject to the Hours of Service Act are defined as those individuals "actually engaged in or connected with the movement of any train, including hostlers." 45 U.S.C. § 61(b)(2).

[7] RLEA challenged those regulations and they were found to be in violation of the Fourth Amendment to the Constitution of the United States as being an unreasonable search and seizure. *RLEA v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, Sup. Ct. No. 87-1555 (June 6, 1988). That case was argued before this Court on November 2, 1988.

substances during a periodic or return-to-work physical are held out of service and will lose their seniority unless they either test negative for the presence of controlled substances within forty-five (45) days or agree to enter, and are accepted into, an approved treatment program, in which case the employee is then given 125 days to provide a negative drug test. J.A. at 70.

Once Conrail implemented its new testing rules, RLEA and its constituent organizations responded by filing a complaint with the United States District Court for the Eastern District of Pennsylvania against Conrail on May 1, 1986, seeking declaratory and injunctive relief to prevent Conrail from changing the working conditions of employees.[8] J.A. at 11. Conrail responded to the complaint by asserting, among other defenses, that the dispute over its ability to change its testing procedures was a "minor" dispute subject to the exclusive jurisdiction of the Railway Labor Act's adjustment boards and, thus, was a dispute over which the district court had no jurisdiction. J.A. at 31.

B. *Rulings Of The Lower Courts*

On April 28, 1987, the district court entered an order dismissing rail labor's complaint for lack of subject matter jurisdiction. J.A. at 108. According to the district court, "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." J.A. at 109. As the district court explained (J.A. at 109-10):

> The union [*sic*] and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, stipulation ¶ 1, and since 1976 they have acquiesced

[8] RLEA also asserted that the testing violated the Fourth Amendment of the Constitution of the United States. J.A. at 22. However, the district court held that rail labor had failed to show that Conrail was a "federal actor" and dismissed the search and seizure challenge; respondents did not appeal from that ruling and, thus, that constitutional issue is not presented by this case.

> in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

Since it concluded that Conrail's contractual justification argument was at least "arguable," the court held that the dispute was a minor one over which it had no jurisdiction, and it accordingly dismissed the complaint. J.A. at 110. Respondents noted an appeal to the United States Court of Appeals for the Third Circuit on May 15, 1987.

On April 25, 1988, the court of appeals issued its decision reversing and remanding the district court's judgment, because, in the appellate court's opinion, it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." J.A. at 125. Consequently, the court of appeals concluded, this case did not involve a dispute over an interpretation of a contract, but rather, involved a dispute over a change in working conditions which could not be accomplished until Conrail had complied fully with the dispute resolution procedures of Section 6 of the Railway Labor Act, 45 U.S.C. § 156. J.A. at 129.

After observing that the Railway Labor Act has always drawn a "distinction between disputes arising from grievances and the interpretation of a contract ('minor' disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ('major' disputes), on the other" (J.A. at 118), the appellate court noted that the terms "major" and "minor" were used in their literal sense by the rail industry when the Act was amended in 1934 to make the adjustment of "minor" disputes both mandatory and conclusive. J.A. at 119. The court then examined this Court's analysis of the difference between the two classes of disputes in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S.

711, 723-25 (1945), and observed that its circuit had adopted the "arguably justified" test for distinguishing between the two classes of disputes. J.A. at 120. As the appellate court explained, for purposes of distinguishing between the two classes of disputes, it made no difference whether the terms of a collective bargaining agreement were embodied in a written agreement or in an implied-in-fact agreement. *Id.*

That fact was important here, because (J.A. at 121):

> In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. § 153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. § 152, Seventh, over which it must bargain.

Addressing the implied agreement on medical examinations, the appellate court concluded that it was not plausible to believe that Conrail and its unions had reached a meeting of the minds on drug testing without particularized cause. As the court explained (J.A. at 126-27):

> If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

As further support for its conclusion that it was not plausible to believe that the parties had reached any agreement on drug testing as a routine matter, the court noted that the issue of drug testing presents a particularly contentious subject, both in the rail industry and in other industries, because of the serious ethical and practical dilemmas which it poses. J.A. at 127. Since Conrail could not point to any existing agreement between it and rail labor "on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (J.A. at 128), all of which were subjects which naturally flowed from the drug testing issue, the appellate court concluded that "the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen."[9] *Id.*

Conrail filed a petition for a writ of certiorari with this Court on June 30, 1988, and on October 3, 1988, this Court granted that writ. This review proceeding has followed.[10]

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[9] Rail labor has asserted throughout this case that the new testing represented a change in the method of enforcing Rule G, but Conrail has denied any such connection. J.A. at 128. In view of its ruling on Conrail's medical examination claim, the appellate court did not reach the Rule G enforcement issue. J.A. at 129.

[10] On November 21, 1988, the Department of Transportation caused various regulations to be published in the Federal Register to implement the Department's policy of a "drug-free transportation workplace." 53 Fed. Reg. 47,002 (Nov. 21, 1988). Included in those regulations were regulations by the FRA calling for random testing and imposing a requirement that railroads prohibit the use of unauthorized controlled substances by off-duty employees; those regulations, however, will apply solely to employees covered by the Hours of Service Act, *supra*. 53 Fed. Reg. at 47,102-08. RLEA has filed suit in the United States District Court for the Northern District of California challenging those new regulations. *RLEA v. Burnley*, Civil Action No. C-88-4824-CAL.

SUMMARY OF ARGUMENT

Although this case factually involves drug testing, the wisdom of such testing or the need for railroads to control the abuse of drugs by their employees is not at issue in this case. Indeed, rail labor has long recognized the need to control drug abuse, including the abuse of alcohol, by rail employees, and it has sought to address this problem by various methods, including through the collective bargaining process. This case, however, does present a legal issue which is very much in dispute today in the rail industry, as well as in the airline industry which is also covered by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* That question is whether a carrier subject to that labor statute may implement new work rules and working conditions without first bargaining with rail labor simply by asserting that it has by past practice the implied contractual right to implement the new rules and working conditions, and that any dispute over its change of working conditions therefore raises only a "minor dispute" over which the adjustment boards have exclusive jurisdiction. Respondents respectfully submit that the Third Circuit was correct in concluding that Conrail's unilateral actions violated the major dispute resolution procedures of the Railway Labor Act.

I. Rail labor disputes concerning rates of pay, rules or working conditions have long been divided into two classes: disputes over changes to existing agreements—"major disputes;" and disputes over grievances or the interpretation or application of existing agreements—"minor disputes." Disputes over changes have always presented the most concern to the industry and, thus, have posed the greatest danger to uninterrupted rail service. Congress has repeatedly recognized that fact and it has agreed with rail labor and management that such disputes should be subject to compulsory conferences, mediation, and public scrutiny, but not compulsory arbitration, before either side would be allowed to change

the actual, objective working conditions and practices broadly conceived, which were in existence when the dispute arose. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 152 (1969).

Contrary to Conrail's assertions, the Act's status quo obligation is not rendered nugatory by a carrier's claim that it has a contractual right to change the existing working conditions. Rather, the duty to exert every reasonable effort to settle all disputes set forth in Section 2 First of the Act, 45 U.S.C. § 152 First, as well as the fact that "disputes concerning changes in . . . rules, or working conditions may not be . . . referred" [11] to the adjustment boards for binding, compulsory arbitration, shows that disputes over changes are presumptively major disputes unless the carrier can satisfy either of the two limited exceptions set forth in Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh. *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *Detroit & Toledo Shore Line, supra*, 396 US. at 151. Conrail cannot show that it has complied with Section 6 of the Act, 45 U.S.C. § 156, before making the changes at issue, because it has not served the 30 day advance notice. Also, Conrail cannot show that the changes it has made are "in the manner prescribed in" its agreements because its asserted contractual right is not clear and patent. Since Conrail cannot show that it has satisfied either of the two exceptions in Section 2 Seventh against changes, it may not make the changes until either of two events occur: (1) it serves a notice under Section 6 and complies fully with the Act's bargaining processes; or (2) it obtains an adjustment board award sustaining its claim of contractual authorization. *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964).

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[11] *Hearings on S.3266 Before Senate Committee On Interstate Commerce*, 73rd Cong., 2d Sess. at 17 (1934) (Statement of Joseph H. Eastman.)

II. A second problem with Conrail's argument is that Conrail is incorrect in asserting that it has an arguable contractual right to make the changes involved in this dispute. To support such an asserted contractual right, Conrail has to show that rail labor has waived its fundamental right, guaranteed by Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, to bargain before Conrail changes existing collective agreements. No such showing is possible here, because Conrail is attempting to use its medical fitness rules to bypass the limitations which its agreements with rail labor have placed upon Conrail's enforcement of Rule G. Thus, it is not plausible to believe that rail labor has agreed with Conrail that the carrier can arbitrarily control off-duty, non-employment related conduct, as Conrail is seeking to do here. If Conrail wishes to control such conduct, it must bargain with rail labor for rules that are mutually acceptable. Any other approach to Section 2 Seventh would nullify the Act's codification of the fundamental right of employees to be consulted prior to the implementation of a decision by management adversely affecting wages or working conditions.

ARGUMENT

I. Conrail's Addition Of A Drug Screen To the Urinalysis Component Of Its Routine Periodic, Return-To-Duty, and Follow-Up Physicals, And Its Decision To Treat Employees Who Test Positive For Drugs During Such Physicals Differently Than It Treats Employees Who Fail Such A Physical For Medical Reasons, Constitute Changes In Working Conditions As Embodied In Agreements And Thus Present A Major Dispute

Conrail's new drug testing procedures are a clear change in working conditions established by an agreement, and, thus, constitute a major dispute. Ignoring this fact and the fact that rail labor wishes to bargain with it over whether such changes should occur, and if so, under what circumstances and with what consequences, petitioner Conrail argues that it may

implement its new testing procedures without first reaching an agreement with rail labor on the concerns raised by respondents. According to Conrail, it has in the past unilaterally modified the type of tests which it has given to employees during routine physicals, and thus, it argues, it has at least an arguable contractual right to add a drug screen and, if an employee fails that routine drug test, to revoke that employee's seniority. Conrail confidently asserts that since rail labor disputes the existence of any such contractual right, this case presents nothing more than a dispute over Conrail's interpretation of its contractual rights, and thus presents a minor dispute, which is within the exclusive jurisdiction of the adjustment boards established by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. Federal courts, Conrail argues, have no jurisdiction over this kind of a dispute. Moreover, it argues, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, does not require that it refrain from changing the established working conditions until the dispute over its contractual authority is resolved, and thus, it can implement its new policies without first utilizing the Act's dispute resolution processes to adjust this dispute.

Respondents respectfully submit that Conrail's argument distorts the dispute resolution procedures of the Railway Labor Act by attempting to convert a dispute over whether and, if so, how rules and working conditions shall be changed, into one over nothing more than the interpretation of existing rights. Moreover, Conrail and *amici* are asking this Court to ignore a fundamental principle of this labor statute—*i.e.*, its status quo concept—and to construe the Act in such a manner that a carrier will be permitted to change existing rules or working conditions *before* the parties have exhausted the Act's dispute resolution procedures. Such a result, rail labor respectfully submits, is contrary to the terms of the Railway Labor Act, to its legislative history, and to prior decisions of this Court interpreting that Act and its judicially enforceable commands.

A. The Terms Of The Railway Labor Act And Its Legislative History Show That Congress Intended Disputes Concerning Changes In Rules Or Working Conditions To Be Resolved By Conferences And By Mediation; Such Disputes Are Not To Be Referred To Adjustment Boards

Disputes in the rail industry involving rates of pay, rules or working conditions have long been divided into two classes—first, disputes over changes in rates of pay, rules or working conditions; and second, disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. This distinction between classes of disputes pre-dates the Railway Labor Act of 1926, 44 Stat. 577, and has been carried forward in that Act and in all subsequent amendments.

1. *The Initial Adjustment Boards*

During the Government's operation of the railroads during World War I, the Director-General of Railroads acted upon this distinction by providing two different mechanisms to settle the different classes of disputes. On April 30, 1918, Director-General McAdoo issued General Order No. 27 which established the Board of Railroad Wages and Working Conditions to hear and investigate disputes concerning changes to rates of pay, rules or working conditions. *See*, H.D. Wolf, THE RAILROAD LABOR BOARD at 18-19, 49 (Univ. of Chicago Press 1927). "This board was solely an advisory body and its findings and conclusions were incorporated in recommendations to the Director-General to be acted upon as he saw fit." *Id.* at 49-50. During this same time period, the Director-General established three "Railway Boards of Adjustment," one for each of three groups of crafts of employees. *Id.* at 50-52. Those boards were composed of equal numbers of representatives of the carriers and employees and were to "adjust" controversies "arising out of the interpretation and application of wage agreements, not including matters passed upon by the Rail-

road Wage Board."[12] *Id.* at 51. "A majority vote of all members of the Board was sufficient to approve a decision, and where it was impossible to obtain a majority vote, any four members of the Board might refer the matter to the Director-General for final decision." *Id.*[13]

When Congress returned the railroads to private control by the Transportation Act of 1920, 41 Stat. 456, it recognized generally this distinction between disputes. That Act created the Railroad Labor Board with authority to investigate and to report on unresolved labor disputes, including both disputes over changes and disputes over grievances. Sections 304, 307, 41 Stat. at 470-71. The adjustment board concept as a means to resolve grievances was continued, but Congress made the creation of adjustment boards purely voluntary with no

[12] Mr. Wolf described the method of handling disputes referrable to an adjustment board as follows (RAILROAD LABOR BOARD, *supra*, at 51-52):

> The method of procedure in bringing a case before the adjustment board was simple. Where "personal grievances or controversies" arose, the dispute was handled in the usual manner by general committees of the employees, up to and including the chief operating officer of the railroads or his representatives. If the matter were not settled there it was submitted to the chief executive of the organization of which the employee was a member, and if the employee's contention were approved, the matter was referred to the Director of the Division of Labor. He then referred it to [the appropriate Board]. . . .

[13] These boards were very successful in deciding disputes without deadlocking. As Director-General Hines explained in his Report:

> With a full practical knowledge of the problems, the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically every case.

RAILROAD LABOR BOARD, *supra*, at 55, *quoting Report of Director-General for the Fourteen Months Ending March 1, 1920* at 15.

guidelines as to their composition or deadlock resolution procedures. Sections 302 and 303, 41 Stat. at 469-70. As explained in THE RAILROAD LABOR BOARD, *supra* at 267:

> In passing the Transportation Act, Congress fully expected that adjustment boards of some kind, presumably similar to those set up by the Railroad Administration, would be established and would become an integral part of the machinery for settling disputes. Both the House and the Senate bills, from which developed the Transportation Act, provided for such boards. The conference committee, to which the two bills were referred, likewise provided for adjustment boards in its preliminary draft, but upon the advice of Director-General Hines the mandatory provision was revised and the matter was left to the option of the carriers and the employees. That act as finally passed thus provided that adjustment boards might be established "by agreement between any carrier, group of carriers, or the carriers as a whole, and any employee or subordinate officials of carriers, or organizations or groups of organizations thereof."

However, primarily because of a dispute over whether national as contrasted with local boards should be established,[14] very few boards were established. *Id.* at 267-73. Several regional boards were established for operating employees (*id.* at 273-75), but overall, the adjustment board concept as a means to resolve grievances and interpretation issues was not implemented during the Rail-

[14] In 1920, the labor committee of the railroad's Association of Railroad Executives recommended that the Association agree to the creation of national boards of adjustment. One member of that nine-member committee dissented because, he asserted, national boards would encourage the organization of employees and increase the power of the national unions. The Association rejected the labor committee's recommendation, and opposed national boards. *See, Hearings on S. 2646 Before the Subcommittee of the Senate Committee on Interstate Commerce*, 68th Cong., 1st Sess. at 175-79 (1924).

road Labor Board era. According to Mr. Wolf (*id.* at 272-73):

> It was particularly unfortunate that the two sides were unable to adjust their differences in these conferences. The matter cropped up again and again in subsequent hearings before the [Labor] Board and was the cause of a great deal of bitterness between the carriers and the organizations. Of even more importance, the lack of adjustment boards of some kind resulted in a great number of minor cases coming before the Labor Board. These took up its time and attention and prevented it from giving the same deliberate consideration to the more important cases which it might otherwise have done. . . .

2. *Railway Labor Act of 1926*

For a variety of reasons, the labor provisions of the Transportation Act of 1920 proved ineffective and by the mid 1920s many were seeking a change. *E.g.*, *Elgin, Joilet & Eastern Ry. v. Burley*, 325 U.S. 711, 752 n.1 (1945) (Frankfurter, J., dissenting); RAILROAD LABOR BOARD, *supra* at 404-07.[15] In 1925, rail labor and the Association of Railway Executives entered into extended discussions on a proposed solution to the inadequacies of the Labor Board, and by January 1926, had drafted a bill which was then presented first to the President and then to Congress. RAILROAD LABOR BOARD, *supra* at 415-6.

[15] After months of drafting and soliciting comments from various sources, rail labor presented a bill to Congress which was submitted as the Howell-Barkley bill, S.2646, 68th Cong., 1st Sess., and H.R. 7358, 68th Cong., 1st Sess. Hearings were held on the Senate bill and it was modified by the Senate Committee on Interstate Commerce to add what is now Section 10 of the Railway Labor Act. The Howell-Barkley bill was not enacted, but it became the framework for the negotiations which resulted in the proposed bill submitted by both labor and management in 1926. THE RAILROAD LABOR BOARD, *supra* at 407-14. Consequently, respondents respectfully submit, the Senate Subcommittee hearings on S.2646 are instructive in understanding the intent of similar provisions in the 1926 Act.

That proposed legislation, without any substantive amendments, became the Railway Labor Act and essentially follows the earlier Howell-Barkley bill, as amended by the Senate Committee (*see*, note 15, *supra*), with certain exceptions. The most notable exception as relevant here is that the Howell-Barkley bill had proposed the creation of national adjustment boards; the 1926 Act, however, provided that "Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees." Section 3 First, 44 Stat. at 578.

Like rail labor's earlier version, the Railway Labor Act of 1926 recognized that there were essentially two classes of disputes, the most troublesome of which were disputes over changes. Rail labor had proposed in 1924 that the carrier and employees be required to give thirty (30) days' advance notice of any intended change affecting rates of pay, rules or working conditions, and that no change be made until the controversy had been conferenced and, if one side requested or the Government wished, mediated.[16] In 1926, Congress followed the prior notice, negotiation, mediation and voluntary arbitration route for these disputes, essentially as had been proposed in the Howell-Barkley bill.[17] As had been proposed in the

[16] Rail labor maintained that the 30 days' advance notice and prohibition on unilateral changes were not novel concepts, for they followed principles established by the Railroad Labor Board and other legislation. *See, Hearings on S.2646, supra* note 14, at 16-17.

In 1921, the Railroad Labor Board had concluded that an essential "principle" of collective bargaining, and thus, respondents submit, one of the "reasonable efforts" which Section 301 of the Transportation Act of 1920 required in its hortatory provision that carriers adopt, was that: "The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." Railroad Labor Board *Decision No. 119*, 2 R.L.B. Dec. 87, 96 (1921). That principle went on to provide that it would be satisfied by conferences. *Id.*

[17] One difference between Section 6 as enacted in 1926 and Section 6 of the Howell-Barkley bill was that the 1926 legislation did

Howell-Barkley bill, adjustment boards were to be given jurisdiction to consider unresolved "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." *Id.* at § 3 First (c), 44 Stat. at 578. And Section 3 of the 1926 Act, like the earlier version, was premised on the assumption that adjustment board members, being removed from the emotions present at the site of the dispute, would apply their expertise to the agreements in an impartial manner and resolve most disputes. *Hearings on S. 2646*, *supra*, at 18-19 (Statement of D.R. Richberg); *see also*, note 13, *supra*.

The 1926 Act, however, did *not* provide a procedure for the adjustment board to resolve deadlocks, but like the 1924 version, provided that deadlocked grievances could be referred to the Board of Mediation established by Section 5 of the Act; Section 5 First (a) provided that the following type of dispute could be referred to the Board of Mediation: "A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board . . . ." 44 Stat. at 580.

Following the long-standing practice in the industry, the 1926 Act made *both* disputes over changes and disputes over grievances or interpretation questions subject to the general duty that the parties "exert every reasonable effort . . . to settle all disputes . . . ." Section 2 First, 44 Stat. at 577-78. Moreover, *both* types of disputes were subject to mediation if not resolved through conferences and, for grievance and interpretation disputes, through the adjustment board process. *Both* types of disputes which remained unresolved after mediation could be arbitrated, but only if both parties

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not include the penalty provisions which were included in Section 6(B) of the Howell-Barkley bill.

agreed, and *both* classes of disputes could be investigated under the Emergency Board process of Section 10 of the Act. 44 Stat. at 582-586.

The fact that both classes of disputes were subject to the duties imposed by Section 2 First is important, because as this Court explained in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 151 (1969) (footnote omitted), there is an "implicit status quo requirement in the obligation imposed upon both parties by § 2 First, 'to exert every reasonable effort' to settle disputes without interruption to interstate commerce." That status quo obligation, respondents respectfully submit, was an essential feature of the 1926 Act, and that feature has not been altered.

The Railway Labor Act of 1926 was a compromise, to which both rail labor and the carriers agreed, which both sides asserted would prevent labor disputes from reaching the point that an interruption of commerce would occur if the parties faithfully adhered to the terms of their compromise; as the railroads' spokesperson, Mr. A.P. Thom, informed Congress in 1926:

> We come here with the agreement. We come here with the implication by our coming that both parties are committed to this as a means of preventing interruption of transportation. And that every step in it must be pursued before there is an interruption of transportation. The labor men would not be able to justify their application for this measure if it would result in an interruption of transportation until every step in this bill had been pursued. *The carriers could not justify themselves in public opinion if they brought about a dispute which would interrupt transportation before following each step in this bill.*

Hearings on S. 2646 Before Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. at 16 (1926) (Statement of A.P. Thom) (emphasis added). Rail La-

bor's spokesperson, Mr. Richberg, also emphasized the connection between the duty agreed to in Section 2 First and the status quo feature of the compromise:

> *As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law.* Their primary duty is to exert every reasonable effort to avoid interruptions of commerce through disputes. The "reasonable efforts" are set forth here that all disputes shall be considered and decided in conference, if possible; that, second, if conference fails a certain type of disputes shall be carried to the board of adjustment; the other type of disputes, or those not decided by the board of adjustment, may be carried to the board of mediators, and it shall be the duty of the board of mediators to act.

Hearings on H.R. 7180 Before House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. at 92-93 (1926) (Statement of D.R. Richberg) (emphasis added).

3. *1934 Amendments To Section 3 of Railway Labor Act*

While successful to a large degree in preventing interruptions to commerce, the Railway Labor Act of 1926 proved to have certain defects which prevented the resolution of many disputes.[18] As relevant here, one such defect was in the adjustment board process, for once again the parties had not been successful in establishing adjustment boards to the degree contemplated by the 1926 Act. *Hearings on S. 3266 Before Senate Committee On Interstate Commerce*, 73rd Cong., 2d Sess. at 15

[18] One major defect corrected by the 1934 legislation was the lack of any method in the 1926 Act to resolve disputes over employee representatives. That issue is not relevant here.

(1934) (Statement of Joseph B. Eastman).[19] Moreover, rail labor's expectation that the adjustment boards would operate as they did during the federal control period, resolving most grievances, proved incorrect; as Commissioner Eastman explained: "Not only are they [*i.e.*, deadlocks] possible, but they have occurred in a large number of cases, and of late there has been a continually growing tendency toward such deadlocks. The number now existing runs into the hundreds." *Id.* at 17. As Commissioner Eastman explained to Congress in 1934, the bill which his office had drafted and had submitted to Congress to amend the 1926 Act

> attempts to remedy both of these deficiencies in the present law. It provides for the creation of a National Adjustment Board to which unadjusted "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" may be enforced. *Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred, but are to be handled, when unadjusted, through the process of mediation.*

Hearings on S. 3266, supra, at 17 (emphasis added).

By 1934, the rail industry had developed the colloquial terms of "major" to refer to disputes over changes and "minor" to refer to disputes over grievances or interpretations. *See*, THE RAILROAD LABOR BOARD, *supra* at 50.[20] Indeed, when the hearings on the 1934 amend-

[19] Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Railroad Coordinator. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

[20] In its First Annual Report, the Board of Mediation established by the 1926 Act, explained that disputes referred to it under Section 5 First(a) were given a different docket designation than were

ments are reviewed, it is clear that those terms were used essentially in their literal sense. *E.g., Hearings on S. 3266, supra,* at 158; *Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce,* 73rd Cong., 2d Sess. at 49-51 (1934). For example, the following exchange occurred between Mr. George M. Harrison, the Chairman of RLEA, and Senator Dill, the Chairman of the Senate Committee on Interstate Commerce (*Hearings on S. 3266, supra,* at 33-34):

> THE CHAIRMAN. Now, will you explain—I suppose I ought to know this, but I don't—just what kind of controversy is to be settled by these boards [*i.e.*, adjustment boards], and what kind by the boards of mediation. I haven't got it clearly in my mind.
>
> MR. HARRISON. I will be glad to. Being so familiar with the law, I probably didn't go into that as thoroughly as I ought to. There are two classes of controversies that develop. One is what we call major changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.
>
> THE CHAIRMAN. On all the railroad systems in the country?
>
> MR. HARRISON. That is right. Now, that is handled in this fashion: You have a conference with the officers of the railroad and endeavor to agree. If you are unable to agree then, either party has the privilege of invoking the aid and service of the United States Board of Mediation. The Board of—
>
> THE CHAIRMAN. (interposing). Will have under the law?
>
> MR. HARRISON. Yes; there is no change in that. Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that

given to the "major cases." It referred to the grievance cases as "minor cases." *See,* Annual Report of the United States Board of Mediation for Fiscal Year ended June 30, 1927, at 11.

> the rule of the contract should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules.

By agreeing to the National Railroad Adjustment Board, and in particular by agreeing to the provision in the proposed amendment to resolve deadlocks by arbitration (*see,* 45 U.S.C. § 153 First (l)), rail labor agreed to a form of compulsory arbitration. As Commissioner Eastman explained in response to a question as to whether the proposed amendments made it a matter of "duty" on the part of the parties to arbitrate deadlocks (*Hearings on H.R. 7650, supra,* at 58):

> COMMISSIONER EASTMAN. Yes; and it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment boards—are entirely agreeable to those provisions of the law.
>
> I think that is a very important concession on their part. It does not go to the major issues with reference to wages and working rules; but to all disputes except working rules and wages.
>
> • • • •
>
> . . . The only jurisdiction that the adjustment board has is over these minor grievances.

Commissioner Eastman also emphasized the limitations which the proponents of the amendments clearly recognized were being placed on the adjustment boards' jurisdiction, when he stated (*Hearings on H.R. 7650, supra,* at 64) (emphasis added):

> [D]o not make any mistake about this: You have referred to wages. *The whole matter of working*

> *rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon.* It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. *The basic matters are left for the processes of mediation.*

Congress accepted Commissioner Eastman's proposal and gave adjustment boards jurisdiction over "minor" disputes. Act of June 21, 1934, ch. 691, 48 Stat. 1185.

4. *Enactment of Section 2 Seventh*

At the same time Congress amended the Railway Labor Act to create the compulsory adjustment boards, it added Section 2 Seventh, 45 U.S.C. § 152 Seventh, which still provides as follows:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner described in such agreements or in section 6 of this Act.

While the 1934 legislative history on this provision is very brief, that provision traces its origin to Section 77(o) of the Bankruptcy Act, as amended in 1933. Act of March 3, 1933, ch. 204, 47 Stat. 1467, 1481. Section 77(o) provided that (47 Stat. at 1481):

> No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class I railroads.[21]

[21] The Chicago Agreement provided for a 10% wage reduction for one year. It also provided that: "[T]his arrangement shall terminate automatically January 31st, 1933 . . . ." Memorandum of Agreement at 2 (on file with National Mediation Board). *See*, 76 Cong. Rec. 5118 (Feb. 27, 1933) (Remarks of Sen. Norris).

Three months after the Bankruptcy Act amendments were enacted, Section 77(o) was made applicable to all rail carriers by Section 7(e) of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, 214.[22] Since the Emergency Railroad Transportation Act was a "temporary measure," Commissioner Eastman proposed that the substantive provisions of Section 7(e) be included in the 1934 amendments to the Railway Labor Act (*Hearing on S.3266, supra*, at 13); Congress agreed. Thus, the legislative history of the 1933 amendments is instructive in construing the intent of Section 2 Seventh of the Railway Labor Act.

The "labor amendments" to the 1933 Bankruptcy Act amendments were proposed in the Senate by Senator Norris, essentially to make explicit what Congress considered to be already included in existing laws. 76 Cong. Rec. 5118 (Feb. 27, 1933); *see also*, 76 Cong. Rec. 5358 (March 1, 1933) (Remarks of Rep. Parker). Two months later, during the hearings on the Emergency Railroad Transportation Act of 1933, rail labor proposed that the bill be amended to include provisions that would insure the protection of labor's rights under the Railway Labor Act, as those rights had been intended to be protected by the 1926 legislation. One clarification which rail labor sought was that:

> No bulletin, notice, or other method of changing contractual requirements or the established inter-

[22] Section 7(e) provided that: "Carriers, whether under control of a judge, trustee receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of section 77, paragraphs (o), (p) and (q), of the Act approved March 3, 1933," *i.e.*, the 1933 Bankruptcy Act amendments. Section 77(p) and (q) of the Bankruptcy Act dealt with "yellow dog contracts" and discrimination because of union membership. 47 Stat. at 1481.

> pretation or application of an existing contract between a carrier and its employees or fixing wages or working conditions without an agreement between a carrier and its employees, shall be effective unless made after compliance with the requirements of the Railway Act and particularly as set forth in sections 2 and 6 thereof.

Hearings on S.1580 Befor the Senate Committee on Interstate Commerce, 73rd Cong., 1st Sess. at 101 (1933) (Statement of Donald R. Richberg).[23] After quoting the above proposal, Mr. Richberg explained that Congress should clarify its original intent, because (*id.*):

> We have had that experience during this entire period of the depression, the use of the depression as an excuse more or less for the continuing disregard of the requirements of the Federal law, affecting notices, bulletins, announcing changes in position, announcing such changes as would involve moving of 100 men from their homes, notices of consolidation, changing their hours and changing their positions. We have had a state of guerilla warfare all over the United States of that character and it is about time to stop.
>
> SENATOR LONG. What did you say brought that about?
>
> MR. RICHBERG. In the desire to create economies and the necessity of economy during the depression, we have had simply disregard of the requirements of the law and the arbitrary changing of working conditions for men all over the country, as a part of these consolidations. . . .[24]

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[23] The "amendments" proposed by rail labor were actually "comments in the form of proposed amendments to express clearly our ideas, without any assumption that these are expressed in the best form for legislative use." *Hearings on S.1580*, *supra*, at 78 (Statement of D.R. Richberg).

[24] Shortly after making that statement, Mr. Richberg explained that no change could be made until after the parties had complied with the labor statute, but added that this was correct "so far as it involves change in existing contractual relations, not so far as it is entirely within the scope of it, no. There is no requirement that they have to have notice of everything to be done within the scope of the existing contract." *Hearings on S.1580* at 101.

Although Congress did not include the specific language proposed by Mr. Richberg during his testimony, the substance of all of those proposals, according to the legislation's supporters, was included in the bill passed by Congress. 77 Cong. Rec. 4256 (May 26, 1933); 77 Cong. Rec. 4870 (June 2, 1933).

In 1934 Commissioner Eastman proposed the following language be included in the Railway Labor Act as Section 2 Seventh in order to add to that Act the substantive requirements of Section 77(o): "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, except in the manner prescribed in section 6 or in other provisions of this Act relating thereto." *Hearings on S.3266*, *supra*, at 3.

During the hearings before the Senate Committee on Interstate Commerce, the carriers' representative, W.M. Clement, proposed that Commissioner Eastman's language be amended to read as Section 2 Seventh presently does for the following reason: "This is proposed because the working conditions are not defined in the act. They are covered by agreement, and we believe this is a helpful suggestion." *Hearings on S.3266*, *supra*, at 65. Mr. Clement also suggested that Section 6 of the 1926 Act be amended to add "in agreements" after the word "change" in the first sentence "for definiteness and clarity." *Id.* at 73.

Commisisoner Eastman stated that the amendments were acceptable to him; the Section 2 Seventh amendment, he stated, was "an improvement, and should be made" (*id.* at 151), and the Section 6 amendment was one he "favored." *Id.* at 155. Congress adopted both modifications.

5. *Relationship Between Section 2 First And Act's Dispute Resolution Procedures*

It is axiomatic that the various provisions of the Railway Labor Act must not be read in isolation, but rather, as part of an integrated Act so as to give meaning to the design of the statute as a whole. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). This principle is clearly applicable to construing the relationship between Section 2 First of the Railway Labor Act and the dispute resolution procedures which resulted from the 1934 amendments to the labor statute.

Section 2 First, as this Court has noted on several occasions, is the "heart" of the Act. *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574 (1971). The duty imposed by that section to exert *every reasonable effort* to settle all disputes, this Court has also observed, must be read in conjunction with the status quo concept which is "central" to the Act's design. *Detroit & Toledo Shore Line R.R. v. UTU*, *supra*, 396 U.S. at 150-51.

Indeed, respondents respectfully submit, it is this status quo obligation that makes the Railway Labor Act unique, for the overriding concept behind the compromise which rail management and rail labor agreed to in 1926 was that neither side would do anything to bring abut an interpretation of commerce until they had complied with the Act's dispute resolution processes. *E.g., Hearings on S.2306*, *supra*, at 16 (Statement of A.P. Thom). Changing existing agreements was clearly recognized as involving grave dangers to maintaining uninterrupted commerce. *Hearings on H.R. 7180*, at 93. Thus, as Mr. Richberg explained in 1926 (*see, Hearings on H.R. 7180*, *supra*, at 92-93), maintaining the status quo by not changing working conditions is one of the "reasonable efforts" which the Act requires the parties to "exert" in order "to settle all disputes." 45 U.S.C. § 152 First.

When Section 2 First is read in conjunction with the amendments which Congress made in 1934—which, except for the compulsory arbitration feature for minor disputes, were not intended to "introduce any new principles into the . . . Railway Labor Act, but . . . [were] designed to amend that act in order to correct the defects which ha[d] become evident as a result of 8 years of experience" (H. Rpt. No. 1944, 73rd Cong., 2d Sess. at 2 (1934))—it is clear that the National Mediation Board [hereinafter, "NMB"] accurately described the functioning of the Act when it stated as follows in its First Annual Report:

> While the obligatory conferences are being held, or while a dispute is in the hands of the National Mediation Board, "rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon" by the Board in accordance with the act. *Further responsibilities and obligations are placed on both parties* in connection with disputes involving grievances and the interpretation or application of agreements. All such disputes, if they cannot be settled by the parties in conference, are referable to what is in effect an industrial court, the National Railroad Adjustment Board, and the parties are obligated to obey its decisions. *Similar responsibilities and obligations are assumed* when arbitration in accordance with the provisions of the act is agreed upon by both parties.

First Annual Report of NMB for the Fiscal Year Ended June 30, 1935 at 3 (emphasis added)[25]

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[25] Dean Garrison has described the National Railroad Adjustment Board as a "quasi-judicial body" whose cases "consist of concrete claims like those presented to any court of law . . . ." L.K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 567-68 (1937). Dean Garrison also noted that when the adjustment board's were made mandatory (*id.* at 576):

> The mistake was not made, as in the case of the old United States Railroad Labor Board, of mixing with the judicial duties,

B. This Court Has Emphasized That Federal Courts Play An Important Role In The Orderly Administration Of The Railway Labor Act

When Congress enacted the Railway Labor Act in 1926, it abandoned the approach which it had taken in enacting the labor provisions of the Transportation Act of 1920 which had not provided for legal obligations enforceable by the judiciary. *E.g., Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203, 215-17 (1925). Instead, the Railway Labor Act clearly imposes certain legal obligations upon both the railroads and the employees which may be enforced by the federal courts. *E.g., Chicago & North Western Ry. v. UTU, supra*; *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930). Some obligations, however, are not enforceable in the courts, but must be vindicated through the administrative processes established by the Act. *E.g., General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). In determining which duties are enforceable by the federal courts, this Court has stated that (*Chicago & North Western, supra*, 402 U.S. at 578):

> Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

In the case at bar, petitioner Conrail and the *amici* who support it, argue that Congress has given the adjustment boards exclusive jurisdiction over all disputes where a contract interpretation issue has been raised, and federal courts may not interfere to prevent the carrier from altering the status quo pending resolution of that dispute. Respondents respectfully submit that Conrail's argument is incorrect, for it exalts the jurisdiction of adjustment boards to decide contract interpretation issues beyond all reason, while at the same time it belittles the important role which the federal courts must perform to enforce the Act's bargaining and status quo obligations in disputes involving *changes* in existing collective working conditions.

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the duty of passing upon disputes regarding wages and desired changes in agreements.

In this regard, we emphasize at the outset that there is no dispute in this case over the principle that the 1934 amendments to the Railway Labor Act gave the adjustment boards exclusive jurisdiction to decide authoritatively disputes "growing out of grievances or out of the interpretation or application of agreements" which have not been resolved in conference. *E.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). There is no dispute in this case, either, over the concept that "[f]ederal courts have broad powers to enjoin unilateral actions by either side." Conrail Brief at 16.

Nor do respondents dispute the eqiutable concept that a federal court called upon to enforce the bargaining and status quo obligations of the Railway Labor Act in a case where there is no showing of irreparable injury if injunctive relief is not granted, "should exercise equitable discretion to give . . . [the adjustment boards] the first opportunity to pass" on the question of whether a carrier's action involves *a change in working conditions* where both sides are relying upon arguable and previously unresolved interpretations of their contracts to justify their positions. *E.g., Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946).[28] In such a

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[28] *Pitney* involved a jurisdictional dispute between two labor organizations claiming the contractual right to perform certain work inside a railroad yard. The petitioning labor organization relied upon a 1940 contract and past practice to justify its claim that the Trustees had changed their working conditions by giving cer-

case, the exercise of discretion by deferring to the adjustment board process is warranted, for the board has jurisdiction to resolve the *entire* dispute, with the ability to give *full relief* to either party who ultimately prevails.[27] *E.g., Transportation-Communications Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

However, deference to the adjustment board process, respondents respectfully submit, is not warranted in a case involving a clear change in working conditions where the carrier relies upon a disputed contractual right or a new interpretation of an established and well understood agreement to justify the change. In such a case, the controlling feature of the controversy for dispute-classification, and thus for jurisdictional purposes, should be, we submit, the change itself.

In this case, there is no dispute over whether Conrail is *changing* working conditions covered by a collective understanding, for as all have acknowledged, Conrail's new testing and enforcement procedures have changed the working conditions established by agreement. J.A. at 121-22. Instead, the issue which Conrail claims makes the entire dispute "minor," is its contention that the past

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tain work inside the yard to the other organization. 326 U.S. at 562-63. The other organization, however, relied primarily upon an agreement in 1929 fixing the yard limits and an agreement in 1943, which in its opinion ended the violation of the earlier agreement by giving it explicitly the right to the disputed work, to assert that it had the contractual right to the work. Brief for Brotherhood of Railroad Trainmen in No. 37, 1945 Term, at 9.

[27] Although this Court initially left this issue open, *BLE v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531 n.3 (1960), it is now accepted that federal courts have equity jurisdiction, independent of their qualified jurisdiction to enjoin a threatened strike over a minor dispute, to preserve the status quo in a minor dispute where, if the status quo is not preserved, an adjustment board's decision "in the unions' favor would be but an empty victory" because of the irreparable harm which would have befallen the employees in the interim. 363 U.S. at 534; *see also, NRLC v. IAM*, 830 F.2d 741, 749 (7th Cir. 1987).

practice gives it the contractual right to make these changes unilaterally—*i.e.*, its contention that the changes are being made "in the manner prescribed in such agreements." 45 U.S.C. § 152 Seventh. Thus this case involves a hybrid, presenting both a clear change and a disputed contractual justification for such a change.

As we show in Argument II, *infra*, the appellate court was correct in concluding that Conrail's contractual justification is not plausible in this case, and, thus, does not require that the federal courts decline to exercise their jurisdiction until after Conrail's contract claim is presented to an adjustment board for resolution.[28] However, respondents respectfully submit, this Court need not address the Third Circuit's application of the standards developed by the appellate courts for distinguishing between major and minor disputes, for those standards are inapplicable to hybrid disputes, such as this one, where it is plain that changes in working conditions have occurred.[29]

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[28] Rail labor respectfully submits that either party has the absolute right to submit for adjustment under Section 3 of the Act *any* grievance or claim involving the interpretation or proper application of an agreement which has been conferenced in the usual manner, but which remains unresolved, even if that grievance or claim appears to be frivolous. This principle is firmly established under the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.* (*e.g., AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 649-50 (1986)), and there is no reason why it should not be applicable to the duties imposed by Sections 2 First and 3 First(i) of the Act to exert every reasonable effort to settle all disputes. However, as we explain below, the fact that a carrier has an absolute right to have a frivolous claim heard by an adjustment board does not deprive the federal courts of jurisdiction to enforce Section 2 First, 2 Seventh and 6 of the Act.

[29] Respondents did not challenge below the proper standard to be applied in determination whether the underlying controversy is a major or a minor dispute. However, since this Court will necessarily be deciding that issue in addressing petitioner's question, respondents are setting forth the test which they submit the Act requires be employed.

C. When A Unilateral Change In Working Conditions Fixed By Agreements Is Being Made, The Carrier Must Show A Clear And Patent Contractual Right To Make Such A Change Before The Federal Courts Should Surrender Their Jurisdiction Over the Dispute To The Adjustment Boards

Central to both Conrail's and the *amici*'s arguments that the "arguable" and "obviously insubstantial" test is appropriate, is their contention that this test accomplishes the goal of the Railway Labor Act in requiring that disputes involving contract interpretation issues "be resolved through binding arbitration, without resorting to economic self-help in the form of strikes." Conrail Brief at 35. What Conrail and the *amici* ignore, however, is that under their application of Act's dispute resolution processes, they achieve their goal at the expense of the status quo obligation, for in their view a carrier is free to change the established working conditions both before and during the adjustment board process. Fortunately, such a one-sided view of the Railway Labor Act's status quo requirement is not what is mandated by the Act.

As this Court observed in *Detroit & Toledo Shore Line R.R. v. UTU*, *supra*, 396 U.S. at 150 (emphasis added), while stating that the Act's status quo requirement "is central to its design:" The status quo requirement's "immediate effect is to prevent the union from striking *and management from doing anything that would justify a strike.*" Prohibiting rail labor from striking while allowing the carrier to change working conditions *without a clear contractual right* does not apply the status quo concept evenly, and thus, is inconsistent with the Railway Labor Act's most basic purposes.

A second fallacy in Conrail's and the Government's position is that they fail to recognize that a contract interpretation question can be present in a dispute over changes.[30] Indeed, such a hybrid controversy arises

[30] In its Second Annual Report, the Board of Mediation stated: "In several instances, . . . during the mediation of wages and rules

whenever a carrier relies either on a written agreement or, as is more typical today, on past practice to assert that the disputed change is in the manner prescribed by the agreement. The fact that a contract interpretation issue is present in a dispute over changes should not *a fortiori* control the characterization of the dispute as a whole. This point is well illustrated in one of the only decisions by this Court in which the Court was called upon to characterize a dispute, *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

In the *Telegraphers* case, the railroad sought State regulatory authority to close certain stations and to consolidate the work of its agents who were represented by the Telegraphers. The Telegraphers, in turn, served a notice on the railroad to amend its rules agreement to add a provision that would prohibit the carrier from abolishing any agent job, except by agreement. 362 U.S. at 332. Besides asserting that the subject matter of the union's bargaining proposal was not bargainable, the railroad also asserted that the union was barred by a moratorium clause[31] in a recently concluded national agreement from serving the disputed Section 6 notice. Brief for *Chicago & North Western Ry.* in No. 100, 1959 Term, at 20-21. The railroad invoked the jurisdiction of the adjustment board to resolve its contractual defense and asserted in court that the pendancy of its adjustment board claim made the dispute minor and, thus, made the union's threatened strike enjoinable. *Id.* at 21. This Court rejected that minor dispute characterized as follows (362 U.S. at 341):

differencies, contingent or related grievance matters have been adjusted." Annual Report of United States Board of Mediation for the Fiscal Year Ended June 30, 1928 at 11.

[31] Moratorium clauses in the rail industry are typical in the National Agreements which govern many aspects of rail labor relations, and provide that, for a certain period of time, neither party to the agreement will serve a Section 6 notice on subjects settled by the agreement.

> Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a "minor dispute" may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. . . . But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement. . . .

Like the dispute in *Telegraphers*, it is impossible to classify as minor this dispute which relates to whether Conrail's alteration of the established agreements by testing for drugs without some cause, and its new rule of revoking an employee's seniority for the use of controlled substances while off-duty, should be part of the employees' collective rules. Moreover, it is impossible to classify as minor the dispute over rail labor's desire to negotiate with Conrail concerning whether such testing should occur, and if it is to occur, under what conditions the tests may be administered and with what consequences to employees.

This is so because the record is quite clear that there are no agreements on those points in force at the present time. Thus, the dispute presented by this case is clearly one over the imposition of new employment terms, rather than one involving the enforcement of existing agreements. The resolution of this dispute has thus "been left for settlement entirely to the processes of noncompulsory-adjustment." *Elgin, Joliet & Eastern Ry. v. Burley*, *supra*, 325 U.S. at 724.

Conrail's assertion that this case *involves solely* a contract interpretation issue because it *claims a contractual right to change the working conditions*, ignores both the language of the statute and the reality of the contro-

versy. If Conrail had not made the changes, but had simply asserted a right to do so, then the dispute would have been solely one over the validity of its contractual rights. However, it went further and it implemented the changes. This thus brought into question the issue of whether Conrail, by making those changes, had violated Sections 2 First, 2 Seventh and 6 of the Act. This Court has recognized that the federal courts are the sole tribunal available to enforce those important commands of the Railway Labor Act (*e.g., Chicago & North Western Ry. v. UTU*, *supra*), and therefore, the question of whether the federal courts must exercise that jurisdiction turns on "the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." *Chicago & North Western*, *supra*, 402 U.S. at 578.

In this case, unless Conrail is restrained from implementing the changes, the protections which Congress has given to the collective bargaining process by prohibiting changes until the bargaining process had been completed, will be lost. No adjustment board will ever be able to require Conrail to redo the testing which will have occurred in the interim without the safeguards which rail labor submits are necessary and wishes to negotiate.

Congress foresaw this problem and it declared in 1933 and then again in 1934 when it added Section 2 Seventh, that no change in working conditions as established by agreements shall be made, "except in the manner prescribed in such agreements or in section 6 of this Act." 45 U.S.C. § 152 Seventh. That statutory provision, thus, sets forth the elements which apply in determining whether the federal courts must exercise their jurisdiction lest a failure to act results in the sacrifice or obligation of rights which Congress created in the Railway Labor Act. *Order of Railway Conductors v. Pitney*, *supra*, 326 U.S. at 566. Since Conrail's claim that it has a contractual right to make the changes is not clear and patent, it cannot meet the burden which Section 2 Seventh of the Act places upon it to establish that the change is "in the manner prescribed" in the agreement. Moreover,

respondents respectfully submit, Conrail will not be able to meet that burden of proof until Conrail obtains a final and binding award from an adjustment board establishing the validity of its claim. Indeed, as we show in Argument II, *infra*, Conrail will never obtain such an award.

Respondents respectfully submit that this interpretation of the burden of proof established by Section 2 Seventh of the Act, rather than the virtually non-existent burden established by the "arguable" test,[32] protects the essential features of the labor statute. It maintains the central design of the Act by prohibiting *either* disputant from changing working conditions unilaterally—the type of act which the drafters of this legislation clearly recognized was the most likely to cause interruptions to commerce. It requires the parties to utilize the Act's dispute resolution procedures before altering working conditions, thus requiring them to "exert every reasonable effort . . . to settle all disputes. . . ." 45 U.S.C. § 152 First. And it does not infringe upon either the exclusive jurisdiction of adjustment boards or a carrier's contractual rights; adjustment boards retain their jurisdiction to decide the contract interpretation issue, and the carrier is given the option of submitting its contract claim to an adjustment board or of bargaining.[33] This

[32] Contrary to Conrail's and *amici*'s assertions (*see*, Conrail Brief at 33), the appellate courts are not all in agreement on the "arguable" test. First, the application of that standard with the resultant labelling of the dispute as being "major" or "minor" is usually conclusory. *Compare, Chicago & North Western Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, Sup. Ct. No. 88-464 (Nov. 28, 1988), *with, Burlington Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir. 1988). And second, there is currently much confusion as to how that test should be applied in a hybrid case involving both a clear change and a contract interpretation issue. *See, ALPA v. Eastern Air Lines, Inc.*, D.C. Cir. Nos. 88-7201, *et al.*, filed January 10, 1989 denying *en banc* consideration.

[33] Rail labor submits that just as a court may condition a strike injunction in a minor dispute by requiring the carrier to preserve the status quo, so, too, may a court enjoining a carrier's alteration

approach to Section 2 Seventh is that reached by the court of appeals in *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964), and, we sumbit, is the one intended by Congress.

II. Contrary To Conrail's Assertions, The Third Circuit Did Not Misapply Fundamental Principles Of The Railway Labor Act When It Concluded That Conrail's Claim That It Had A Contractual Right To Alter Unilaterally The Drug Testing Rules Was Not Plausible

Confidently asserting that it has at least an arguable contractual right to alter the drug screening rules without first bargaining, Conrail argues that the Third Circuit fundamentally misapplied well-settled standards in not recognizing that Conrail's purported contractual justification was at least "arguable," thereby making this dispute one within the exclusive jurisdiction of the adjustment boards. As we have explained above, however, Conrail is incorrect in believing that the "arguable" or "obviously insubstantial" test is an appropriate standard to determine whether a dispute concerning a clear change in working conditions should be classified as a major or a minor dispute. But even under the standard advocated by Conrail, petitioner is still not able to bypass the Act's bargaining and status quo obligations because it is simply not plausible to conclude that rail labor has agreed to the changes implemented by Conrail.

To support its argument that it has the contractual right to make the changes in its drug testing procedures without first complying with the Railway Labor Act's major dispute resolution procedures, Conrail points to its past practice of "unilaterally establishing fitness for duty medical standards and related physical examinations . . . ." Conrail Brief at 24. Similarly, Conrail asserts,

of the status quo in enforcing Section 2 Seventh require the moving party to agree to an expedited adjustment board process under Section 3 Second of the Act, 45 U.S.C. § 153 Second.

it has required routine periodic, return-to-duty, and follow-up physicals and it "has altered and amended the components of these examinations from time to time without any bargaining or request to bargain by the Unions." *Id.* at 25. Because the unions have not objected in the past to its alteration of standards and tests, Conrail argues, it has the implied contractual right to include, without first bargaining, a drug screen as a part of all physicals and to discharge an employee who is found to have traces of drugs in his or her system who subsequently fails to remove those substances from his or her body.

In relying solely upon the union's prior silence to argue that it has an implied contractual right to alter the testing procedures unilaterally, Conrail fails to recognize the crucial difference between contractual rights and the "actual, objecitve working conditions and practices, broadly conceived," which the Railway Labor Act's status quo obligation requires be preserved during a major dispute. Contrary to Conrail's belief, the two are not synonymous, for the status quo obligation extends far beyond contractual rights or prohibitions, and ercompasses established practices, *broadly conceived*, which are in dispute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 152-53 (1969). This distinction is important because Conrail looks to this Court's explanation of the manner in which a court should consider prior alterations of working conditions and practices *in determining what working conditions constitute the status quo* (396 U.S. at 153-54), and relies upon *that* explanation to justify its assertion of an implied contractual right here. Conrail Brief at 19-20.

Respondents respectfully submit that those are essentially two fundamental errors in Conrail's position. First, a finding of acquiescence for status quo determinations is *not* the same as a finding that an implied contract exists waiving the right to bargain, for before a past practice can be considered to be binding as a contract, "such past practice must be unequivocal; tacitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation." Special Board of Adjustment No. 1018, Award issued December 15, 1988 at 17a (reproduced as Appendix A to Petition for Rehearing in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*). And second, Conrail's argument emasculates the status quo obligation, for it is attempting to turn what is in actuality an argument as to what working conditions constitute the status quo into a minor dispute which, it then asserts, must be resolved by an adjustment board even if, as here, it is clear that the status quo does not include its right to change the established contractual requirement that drug testing occur only when there is some form of cause.

Besides attempting to change a status quo argument into a minor dispute, Conrail's argument, that it has an implied contractual right to change the drug testing rules unilaterally, ignores the crucial fact that the changes which are at issue in this case merge its fitness for duty determinations with the prohibition against the use of drugs while on duty or subject to call. Conrail and the unions have previously recognized the distinction between the two, for the implied agreements permit testing for drugs during a routine physical, if there is some form of cause—*e.g.*, having been taken out of service for drug usage, or "judgment" of examining physician that employee may have been using drugs. J.A. at 69. Moreover, under the implied contracts dealing with Conrail's medical fitness determinations, employees who fail a physical for medical reasons are not discharged, but are simply taken out of service until the physical condition is corrected. J.A. at 70. Under the new rules, the employees who test positive for drugs during these routine physicals lose their seniority if they do not "provide a negative drug test" within specified time periods. J.A.

at 70. In short, under Conrail's new drug testing rules, the carrier is now regulating the employee's private life by prohibiting the use of controlled substances while off-duty and not on-call.

This merger of two rules, according to the court of appeals, was dispositive of Conrail's implied contract claim, because it showed that it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." J.A. at 125. As the appellate court explained (J.A. at 126-27):

> If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse. . . .

Conrail argues that the court of appeals erroneously rejected its arguments because it "mistakenly" required Conrail to show that there had been a "meeting of the minds" on drug testing, and then weighed the contentious nature of the drug testing issue with the absence of a specific agreement on drug testing to support its conclusion that it was not plausible to believe that there had in fact been a meeting of the minds on drug testing. Conrail Brief at 26. Contrary to Conrail's argument, the Third Circuit did not intrude upon the jurisdiction of the adjustment board when it examined the record to determine if it was plausible to believe that there had been a meeting of the minds, because a "meeting of the minds" on these changes is exactly what Conrail has to show in order to justify its assertion that the changes which it made were "in the manner prescribed" in its agreements with rail labor. 45 U.S.C. § 152 Seventh.

One of the fundamental precepts of the Railway Labor Act is its codification of the Railroad Labor Board's principle that "[t]he right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by

management" (*Decision No. 119*, 2 R.L.B. Dec. 87, 96 (1921)) with the strengthening of that right by requiring thirty days advance notice and the maintenance of the status quo during that bargaining process. The sole exception which Congress made to that judicially enforceable obligation is the recognition in Section 2 Seventh that a carrier need not give notice and bargain *if* the parties had previously agreed that the change in working conditions could be made—*i.e.*, that the parties' right to the subsequent compliance with Sections 2 First, 2 Seventh and 6 had been waived.[34] *See*, note 21, *supra*.

Obviously, to show such a prior understanding, there must be a meeting of the minds on the subject matter of the change, or at least some other indicia of an agreement concerning that subject matter. However, the court of appeals correctly observed, there is no objective showing in this record of any such waiver on non-cause drug testing, and thus it is implausible to believe that the changes made by Conrail were in the manner prescribed in the agreements.[35] Indeed, Conrail itself has asserted

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[34] Indeed, rail labor respectfully submits, because the prior notice and bargaining rights enforced by Section 6 of the Act are so crucial to the Act's scheme, it logically follows that this waiver must be shown by "clear and unmistakable" evidence as is the case with waivers of statutory rights under the NLRA. *E.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Contrary to Conrail's assertions (Conrail Brief at 34), this approach to Section 2 Seventh does not reflect a lack of understanding for the differences between the two labor statutes; rather, it reflects the understanding that the Railway Labor Act is designed to prevent the *need* for interruptions to commerce by strengthening the collective bargaining process, the same goal which the "clear and unmistakable waiver" doctrine fosters under the NLRA. *E.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-84 (1956).

[35] *Amicus* National Railway Labor Conference [hereinafter, "NRLC"] argues that Conrail had the unilateral right to change its drug testing rules because there was no evidence in this case that "Conrail agreed *not* to revise its" drug testing rules. NRLC Brief at 18 (emphasis in original). That argument is specious, for it is not Conrail's agreement, but the Railway Labor Act, which pro-

that: "The record is devoid of evidence that the Unions ever sought bargaining over the drug testing techniques and protocols related to such examinations." Conrail Brief at 28 n.20. Since those techniques and protocols are, in rail labor's view, so crucial for a fair general testing policy (*see*, J.A. at 56-62), it is simply absurd to assert that rail labor has previously agreed to give Conrail carte blanche to nullify the Rule G enforcement rules through its medical testing rules.

Conrail, nevertheless, seeks to downplay this clear failure of proof by pointing to decisions by the Seventh[36] and Eighth[37] Circuits on almost "identical" facts, where the courts held that the addition of a drug screen to routine physicals presented a minor dispute.[38] Conrail

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hibits the change. Moreover, that argument is premised upon the false assumption that the medical examination and Rule G enforcement rules are not agreements; that assumption is contrary to the findings below that those rules are an implied agreement (J.A. at 110, 121) and to 45 U.S.C. § 152 Seventh's legislative history that Section 2 Seventh was intended to apply to collective working conditions. *See*, page 29, *supra*.

Amicus NLRC also asserts that drug testing is not a mandatory subject of bargaining under the Railway Labor Act. NRLC Brief at 20-25. That argument is also specious. First, the Railway Labor Act does not draw a distinction between mandatory and permissive subjects of bargaining, and in view of the lack of any expert agency designed by Congress to develop such nuances under this statute, it is doubtful that Congress intended to draw such a distinction. And second, drug testing is and has long been a subject of bargaining under the Act (J.A. at 58-59, 63-64), and since it clearly has the potential to affect employment rights, either party must bargain over the subject if the other insists. *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 338 (1960).

[36] *RLEA v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987).

[37] *BMWE, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986).

[38] *But see, BLE v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1631 (post-incident testing).

Brief at 21. Respondents respectfully submit that the simple answer to Conrail's reliance on those cases is that those decisions were erroneous. In both cases, the appellate courts acknowledged that the drug screening constituted changes in agreements, but the courts opined that the changes were either not so "drastic" (833 F.2d at 706) or amounted to, "at the most, . . . only a minor change in working conditions" (802 F.2d at 1023) so that they were simply "minor disputes." With all due respect, the Railway Labor Act does not draw a distinction between minor and major *changes*, for Section 2 Seventh prohibits *all* changes in agreements, except those made in the manner prescribed in the agreements or in Section 6 of the Act. *E.g., Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-25 (1945). It is up to the party being affected by the change, and not the courts, to decide whether, in its opinion the change is so "drastic" or "major" that it will exercise its statutory right to bargain over that proposed change.

In short, the Third Circuit properly concluded that Conrail's argument that it had an implied right to merge its medical fitness standards with its enforcement of Rule G, is simply not plausible.[39]

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[39] Although the Third Circuit regarded it as "particularly significant" that the General Counsel for the National Labor Relations Board has taken the position that drug screening constitutes a mandatory subject of bargaining under the NLRA (J.A. at 127), Conrail is incorrect in asserting that the appellate court based its decision on that position or on NLRA principles. Rather, the appellate court carefully traced the distinction between major and minor disputes and properly recognized that the crucial criteria is whether a change, or a true contractual interpretation issue, is in dispute, and it saw the General Counsel's memorandum as confirming its independent conclusion that a change was at issue here.

A few additional words must be added in response to the Solicitor General's discussion of the NLRB General Counsel's memorandum. In asserting that the memorandum supports a finding that the court was without jurisdiction to enforce Sections 2 First, 2 Seventh and 6 of the Railway Labor Act because of the *Collyer* deferral doctrine (*Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971)),

the Solicitor fails to recognize the "central" role which the status quo obligation plays in the Railway Labor Act, but not under the NLRA's statutory scheme.

Moreover, the United States substantially distorts the *Collyer* doctrine itself by ignoring one of the principal limits on *Collyer* articulated by the NLRB. Put simply, the *Collyer* deferral doctrine does *not* apply where deferral *would deny to a charging party any access to injunctive relief from the courts that would otherwise be available as "just and proper,"* 29 U.S.C. § 160(j). *See AMF, Inc.*, 219 N.L.R.B. 903, 912 (1975); *see also* General Counsel's Memo, at 11-13; *cf.* NLRB General Counsel, *Report on Utilization of Section 10(j) Injunction Proceedings, January 1, 1980 through December 31, 1983* (April 23, 1984) at 13-14 (noting and citing cases of 29 U.S.C. § 160(j) injunctions where the employer "implement[ed] important changes in working conditions without bargaining with the union"). And the United States provides no explanation as to why an NLRA doctrine that has been carefully cabined to assure that a union protesting unilateral employer action is not denied equitable relief otherwise available under the NLRA, should be applied to the Railway Labor Act in a way that denies unions access to a statute's otherwise available equitable relief against such unilateral action.

While the best course is to deem the *Collyer* doctrine irrelevant here (*Chicago & North Western Ry. v. UTU, supra*, 402 U.S. at 579 n.11), if any use of *Collyer* is appropriate, it is that even under the NLRA—a statute that relies to a far lesser extent on equitable enforcement of status quo requirements—an employer cannot use deferral to arbitration as a means of escaping otherwise available equitable remedies.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the Judgment should be affirmed.

Respectfully submitted,

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Date: January 17, 1989

APPENDIX A

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications International Union (TCU); and

United Transportation Union.